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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-528

CONSUMERS POWER COMPANY,

Petitioner,

vs.

NELSON AESCHLIMAN, SAGINAW VALLEY NUCLEAR STUDY GROUP, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals, handed down on July 21, 1976, is not yet reported; it appears in the Appendix to the Petition (hereafter "P. App.") at pp. 1-23.[1] The pertinent administra-

1. On the same day, the Court of Appeals also decided Natural Resources Defense Council v. Nuclear Regulatory Commission (hereafter "NRDC v. NRC"), which is reproduced in P. App. at pp. 25-28) and which is also not yet reported. Reference to that decision occupies just one paragraph

tive decisions reviewed by that court are: the December 15, 1972 decision of the Atomic Safety and Licensing Board (P. App., pp. 114-152; reported at 5 A.E.C. 261); the February 20, 1973 decision of the Atomic Safety and Licensing Appeal Board (P. App., pp. 153-170; reported at 6 A.E.C. 60); the March 26, 1976 decision of the Appeal Board (P. App., pp. 171-183; reported at 6 A.E.C. 182); and the May 18, 1973 decision of the Appeal Board (P. App., pp. 184-251; reported at 6 A.E.C. 331).

The Atomic Energy Commission (now the Nuclear Regulatory Commission) declined to review any of those decisions.[2]

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in the Court of Appeals' 23-page opinion in this case. See P. App. at 21. Petitions for certiorari have been filed by the two utility intervenors in NRDC v. NRC, and are pending in this Court as Docket Nos. 76-419 (Vermont Yankee Nuclear Power Corp. v. NRDC) and 76-548 (Baltimore Gas & Electric Co. v. NRDC).

2. The Commission did, however, issue four rulings - each time refusing to reopen the administrative proceedings - while the case was pending in the Court of Appeals. The rulings were: January 24, 1974 (P. App. 257-278, reported at 7 A.E.C. 19); February 5, 1974 (P. App. 279-280, reported at 7 A.E.C. 147); February 20, 1974 (P. App. 281-282, reported at 7 A.E.C. 149); and April 11, 1974

JURISDICTION

The judgment of the Court of Appeals, remanding this cause to the Commission for further proceedings, was filed on July 21, 1976. On September 2, 1976, the Court of Appeals denied motions by the Commission, the United States, and Petitioner for a stay of mandate. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Commission had violated the "basic mandate" of the National Environmental Policy Act ("NEPA") by refusing to consider energy conservation alternatives to Petitioner's proposed nuclear power plant, and in remanding the case to the Commission for consideration of those alternatives.

2. Whether the Court of Appeals erred in holding that the Report of the Advisory Committee

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(P. App. 283-284, reported at 7 A.E.C. 311). The Court of Appeals did not directly pass upon those rulings. See P. App. at pp. 4-5 n.3, 21 & n. 20.

on Reactor Safeguards ("ACRS") -- which is a statutory prerequisite to the granting of nuclear power plant licenses, and which on its face omitted material information -- must be returned to the ACRS for appropriate clarification and supplementation.

3. Whether the Court of Appeals erred in directing the Commission, on remand, to "restrike the cost-benefit analysis" under NEPA, "as necessary," after "appropriate consideration of waste disposal and other unaddressed fuel cycle issues" and of changed circumstances concerning the need for the proposed nuclear power plant.

STATEMENT OF THE CASE

Factual Background

In January, 1969, Petitioner Consumers Power Company ("Consumers") filed with the Atomic Energy Commission an application for a license to construct a nuclear power plant in Midland Michigan. A major purpose of the Midland plant was to produce electricity and steam for sale to Dow Chemical Company. In fact, Consumers would not have proposed the present form or location of the Midland plant but for Dow's asserted intentions to purchase most of the electricity and all of the steam generated by the Midland plant, and to shut down its existing fossil-fuel facilities. The Midland site would be uneconomical, and the proposted nuclear plant too large, but for the Dow relationship.[3]

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3. See R. 17, 355 at pp. I-2, XI-3, XI-10, XI-11; see also P. App. at 136, 148-149. Dow intervened in the licensing proceedings in 1970, to protect its asserted economic interest in the purchase of electricity and steam from the Midland plant. In February, 1974, however, Dow and Consumers announced that they had renegotiated their agreement; Dow thereupon withdrew from the Court of Appeals review proceeding, and has not sought to intervene here. See P. App. at 283-84.

The Proceedings Below

It is unnecessary to recite all of the lengthy proceedings before the Commission and in the Court of Appeals in connection with the Midland nuclear plant. Four aspects of the Commission proceedings, however, are directly pertinent.

1. The ACRS Report. The Advisory Committee on Reactor Safeguards, or ACRS, is a statutory body which is required to "independently review" each nuclear power plant license application, and to submit a report which must be available to the public and must be offered in evidence at the licensing hearings. 42 U.S.C. §§2039, 2232(b); 10 C.F.R., Part 2, §2.743(g). The Commission's rules provide that license hearings may not begin, and no administrative decision on the license application may be made, until the ACRS has completed its task. 10 C.F.R., Part 2, §§2.101(b), 2.101(c); Id., App. A, pars. I(a), I(d), V(f).

In this case, the ACRS submitted a five-page, typewritten letter "report" (R. 2515, App. B), identifying a number of specific design problems going

to the safety of the Midland plant and recommending design modifications. The Report, however, went on to refer in cryptic terms to unspecified "other problems" which "have been identified by the [Commission] Staff and the ACRS," saying that the ACRS "believes that resolution of these [undisclosed] items should apply equally to the Midland plant...." Since the Commission Staff explicitly relied on the ACRS report in its own safety evaluation (R. 2515, at 81-82, 88-92), as the Licensing Board is also authorized to do (10 C.F.R., Part 2, App. A. par. V(f)(1)), respondents here (intervenors before the Commission) repeatedly sought clarification of that murky language, and discovery concerning it, without success.[4]

The Court of Appeals addressed the ACRS issue

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4. See R. 3680, 4661, 7457, 8270. The Petition here asserts (at pp. 21-22) that the "other problems" were, in fact, explained and that the Appeal Board held that they had, in fact, been resolved at the Licensing Board level. Both claims, however, overlook the plain fact that the ACRS letter of December 18, 1972 (to which the Appeal Board refers in its May 18, 1972 ruling, P. App. at 230) was prepared four days after the Licensing Board in this case had issued its decision and the record had been closed.

at some length (P. App., pp. 16-21). It held that the ACRS Report was inadequate on its face, and directed that the Report be returned to the ACRS for clarification and supplementation.

2. The "Energy Conservation" Problem. Initially, the Licensing Board undertook to exclude all environmental considerations from the hearings in this case; the Commission Staff refused even to prepare the Environmental Impact Statement ("EIS") required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4332(2)(C). In Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C., 449 F.2d 1109 (D.C. Cir. 1971), however, the Court of Appeals ordered the Commission to fulfill the statutory mandate. The license hearings were accordingly adjourned while the Commission Staff did its homework.

Despite Calvert Cliffs', however, both the draft EIS and the final EIS prepared by the Commission Staff totally failed to consider energy conservation alternatives to the building of the Midland plant. Respondents challenged those omissions - only

to be met with the claim that such issues were irrelevant as a matter of law. The Licensing Board (P. App. at 137-138, 146) squarely so held. The Appeal Board (P. App. at 235-236) cavalierly dismissed the matter with the claim that energy conservation was "inherently" part of the Licensing Board's cost-benefit analysis (citing, oddly enough, the very portions of the Licensing Board decision wherein that Board had refused to consider energy conservation); and the Commission declined review.

Those rulings, of course, were clearly wrong in light of present law. The Guidelines of the Council on Environmental Quality, 40 C.F.R., Part 1500, §1500.8(a)(4) (38 Fed Reg. 20550, 20554, August 1, 1973), explicitly require inclusion of energy conservation alternatives in an EIS. In November, 1973, the Commission itself reversed its previous exclusionary rule. See Niagara Mohawk Power Corp., 6 A.E.C. 995 (1973), found in P. App. at 252-253.[5]

5. It appears that the NRC acted under at least the threat of judicial compulsion, just as it did in the Calvert Cliffs' context. See Ecology Action v. AEC, 493 F.2d 998,1002 n. 4 (2nd Cir. 1974).

Accordingly, following the Niagara Mohawk decision, respondents again asked the Commission to reopen its proceedings in order to consider energy conservation alternatives. The Commission did not respond to that request until it was ordered to do so by the Court of Appeals (see P. App. at 5, n. 4). Thereafter, it issued a Memorandum and Order (P. App., pp. 257-79) refusing to reopen the proceedings.

Consumers' claim (Pet. pp. 17-19) that the Commission did in fact consider energy conservation alternatives is flatly wrong. Respondents raised fourteen separate energy conservation questions before the Licensing Board (Saginaw Environmental Contentions, Feb. 6, 1972, R. 16,668). No evidence was introduced on any of them, because -- at the express urging of the Commission Staff, see R. 16,963 at Part 2, p. 3 -- both the Licensing Board and the Appeal Board treated the issue as one of law and held respondents' contentions "beyond our province" (P. App. at 137), as well as "beyond the pale of what we view as required by NEPA" (P. App. at 236.).

Following a thorough discussion of the issue (P. App. at 5-16), the Court of Appeals held that this case should be remanded to the Commission for consideration of respondents' energy conservation arguments.

3. The Changes In The Consumers-Dow Relationship. The Commission's Environmental Impact Statement saw the sale of process steam to Dow Chemical Company as a, if not the, primary purpose of the Midland plant. EIS (R. 17,355) at pp. I-2, IX-3, XI-10, XI-11. Both the Licensing Board (P. App. at 136, 148-149) and the Appeal Board (P. App. at 171) agreed; both also agreed with the frank admission in the EIS (R. 17,355, at p. XI-3) that:

> "If [Consumers] were not to supply process steam to the Dow Chemical Co., one unit of the Midland Nuclear Power Plant would be cancelled and consideration would be given to transferring the other unit to a different site, probably the existing Palisades site."

At the time of the license hearings, the Consumers-Dow contract required Dow to shut down all its fossil fuel facilities, thus achieving the objective of abating air pollution. Licensee Response,

Feb. 4, 1974 (Supp. R. 25,350), Attachment C, p. 1. The contract also committed Dow to purchase all its Midland electric needs and all its steam needs, from the Midland nuclear plant. General Agreement, Dec. 13, 1967 (R. 25,407), Ex. C, Ex. D; EIS (R. 17,355) at XI-10.

In February, 1974, however, the Consumers-Dow contract was renegotiated. The result is drastically different. Dow is now committed to purchase no electricity from the Midland plant other than "as auxiliary or stand-by to Dow's presently existing ... facilities;" even that obligation runs only for five years. Similarly, Dow is now committed to purchase only 2,000,000 pounds per hour of steam (the EIS contemplated double that amount), and even so is expressly permitted to generate well over half of that amount for its own use without violating its "obligation" to purchase all of its steam requirements from the Midland plant. And Dow is no longer committed to close down its fossil-fuel facilities.[6]

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6. See Licensee's Response, Feb. 4, 1971 (R. 24,350), Attachment C; Agreement for Electric Service, Jan. 30, 1974 (R. 25,718); Agreement for Steam Service, Jan. 30, 1974 (R. 25, 731).

Respondents repeatedly, but unsucessfully, urged the Commission to reopen the procedings in order to consider those changed, and crucial, circumstances. The Commission refused. P. App., pp. 279-82. After Dow withdrew from the Court of Appeals review proceeding, the Commission -- ex parte and without notice to respondents -- "reviewed" the Dow-Consumers contracts and again refused reopening. P. App. at 283-84.

The Court of Appeals noted these developments (P. App. at 4-5 n. 4), and commented that since this case requires remand for consideration of energy conservation issues and recalculation of costs and benefits, "we assume that the Commission will take into account the changed circumstances regarding Dow's need for... steam, and the intended continued operation of Dow's fossil-fuel generating facilities." Id., at 21.

4. The "Fuel Cycle" Issue. In this case, the

Commission's response to the intractable environmental and safety problems of nuclear waste production and disposal[7] was to ignore them outright. The EIS, for example, completely avoids the entire subject, sloughing it off with the bland statement that wastes will be shipped to unidentified "disposal sites" in not-yet-created containers of unknown design (EIS [R. 17,355] at III-42, 43; Id. at VII-1, Table VII-1); respondents' arguments that that sort of evasion is impermissible were repeatedly rejected on the grounds that nuclear waste problems are "remote and specula-

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7. The Midland plant, according to the EIS (R. 17, 355 at pp. III-42, 43), will annually emit some 4,200 cubic feet of solid radioactive waste; 20,000 gallons of liquid waste; and waste fuel at the rate of 60 elements each year -- each element containing "large amounts [we are not told how much] of fission products and some plutonium." Analyzing the disposal problem in the context of a hypothetical plant considerably smaller than the Midland plant, the Commission has concluded that the time periods required for those wastes to decay to harmless levels are so great "that there is really no choice today but to plan on permanent or ultimate disposal." Safety of Nuclear Power Reactors, AEC Doc. No. WASH-1250 (1973), pp. 4-73 through 4-76. No "presently available method" for that disposal exists. Environmental Survey of the Nuclear Fuel Cycle (A.E.C. 1972), p. G-11.

tive" (P. App. at 92, 100, 105-06), or that those problems are "generic" and hence best left to rule-making proceedings, in which specific problems pertaining to any given plant will by definition be excluded (P. App. at 109-112, 241). After taking that position as to waste disposal, the Boards went on to refuse to consider the environmental costs inherent in allowing the Midland plant to produce sizable quantities of nuclear waste (thus adding to the disposal problem.)[8]

The Court of Appeals disposed of the "fuel cycle" issues in a single paragraph of its 23-page opinion (P. App. at 21). Noting the deficiencies in the EIS, the Court directed the Commission on remand to "undertake appropriate consideration of waste disposal and other unaddressed fuel-cycle issues, and restrike the cost-benefit analysis, as necessary, in accordance with NRDC v. NRC, supra."

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8. These rulings are not, of course, those involved in NRDC v. NRC. See pp. 27-29, 45-51, infra. Consumers' persistent attempt to reargue the NRDC v. NRC decision in this case is mistaken.

The Present Posture of the Case: Events Since The Court of Appeals' Decision

In view of Consumers' persistent claim that the decision below will "frustrate the Nation's nuclear energy program" (Pet., p. 2), and in order to provide this Court with an accurate picture of where this case now stands, four recent developments in this case must be reported.

1. The New ACRS Report. On August 16 and 17, 1976, the Commission entered orders convening a new Licensing Board, to consider whether construction of the Midland plant should be suspended in light of the Court of Appeals' "fuel cycle" ruling. That was done pursuant to the Commission's August 13, 1976 Statement of Policy (41 F.R. 34707 [August 16, 1976]), which, while primarily concerned with fuel cycle matters, noted (Id. at 34709 n. 3) that:

> "An evidentiary hearing on other issues will be required in Midland [i.e., this case], barring further review. That hearing, however, should not be commenced until the [Court of Appeals'] Midland decision has become final."

The decision became final on September 3, 1976, when the Court of Appeals' mandate issued. Accordingly, the issues before the reconvened Licensing Board were expanded to include all of the matters concerning which the Court of Appeals had remanded the case. Memorandum and Order, Dkt. Nos. 50-329, 50-330, Nov. 5, 1976, pp. 1-2. On October 14, 1966, the Licensing Board moved to comply with the Court of Appeals' ACRS ruling by directing the ACRS to undertake the clarification and supplementation of its Report which the Court of Appeals had required; on December 17, 1976, the ACRS released its revised Report, explaining and identifying the "other problems" to which it had cryptically referred in its earlier report. The adequacy of the revised Report under the tests suggested by the Court of Appeals (P. App. at 18-20) has not yet been determined either administratively or judicially.

2. The "Energy Conservation" Developments, And Dow's Present Opposition To The Midland Nuclear Project. Even before the Court of Appeals' decision,

it had become apparent that the glowing prospects outlined in the Commission's Environmental Impact Statement were something less than correct. The $554 million estimate of the overall cost of the Midland nuclear plant (EIS [R. 17,355] at XI-6) had more than doubled by mid-1974; the Consumers-Dow contract, so important to the EIS' claimed benefits, had been renegotiated; and the only other major benefit claimed by the EIS -- production of electricity for the "Michigan power pool," to achieve an 18% power reserve level (EIS, supra, at XI-10) -- had been undercut by Consumers' own frank admissions in another proceeding, Consumers Power Co., Dkts. Nos. 50-475, 50-476. On May 9, 1974, Consumers asked the Commission to defer indefinitely hearings on its application for a nuclear plant construction license in that case, on the ground that sales of electricity were drastically lower than they had been projected "because of energy conservation," and because, given a two-to-three-year deferral of hearings, "it is not unlikely that technological advances and regulatory

changes will necessitate wholesale and perhaps fundamental amendments to the application...."[9]

The inaccuracy of the Commission's EIS has become even more glaring since the beginning of the hearings before the Commission's reconvened Licensing Board following remand of this case. During hearings held between November 30 and December 3, 1976, internal memoranda produced by both Dow and Consumers demonstrated that Dow has long since abandoned any desire to buy steam or electricity from the Midland nuclear plant, and that Dow is attempting to revise downward even its limited obligations under the February, 1974 renegotiated contract with Consumers. A Dow Memorandum prepared by the head of Dow's Michigan Division and dated September 8, 1976, for example,

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9. Applicant's Petition to Withdraw Notice of Hearing, Consumers Power Co., Dkt. Nos. 50-475, 50-476 (May 9, 1974), pp. 2-5. In the press release announcing its deferral request, Consumers also announced deferral of another 800 MWe unit, because "it is not...prudent to build facilities before they are necessary...." These documents were appended to respondents' Reply Brief in the Court of Appeals.

stresses the "serious concern" of the Michigan Division over whether the Midland nuclear plant and Dow's contract with Consumers:

> "...aren't indeed in the process of becoming deterrents to our [Dow's) ability to assure the successful and reliable operation of [Dow's) Midland Plant in the future. We declared publicly last fall that for planning purposes [Dow's Michigan] Division was no longer considering the cost and availability of nuclear-steam to be an advantage to this location."

After pointing out that "one of the issues to be re-examined [on remand to the Commission] is the cost-benefit analysis, which is based on the purchase of steam by Dow from the nuclear plant" and noting that "Consumers has always maintained that Dow's commitment to purchase steam is critical to their retaining a valid construction license," the Memorandum goes on to point out that current cost estimates for completion of the Midland nuclear plant range from $1.6 billion to $2 billion (as opposed to the EIS' $554 million estimate). The Memorandum concludes that "under today's conditions and considering the history of this project that the nuclear project will

most likely be disadvantageous to Dow and to [Dow's] Midland plant and to our employees in this community."[10]

3. The "Fuel-Cycle" Developments. In its August 13, 1976 Statement of Policy (41 F.R. 34707 [Aug. 16, 1976]), the Commission responded to the "fuel cycle" ruling in NRDC v. NRC, supra, by announcing:

> (a) That it would reopen the fuel cycle rule-making, in order to supplement the record concerning nuclear waste management and reprocessing and to determine whether its treatment of those issues should be revised (41 F.R. at 34708);
>
> (b) That no new or full-power construction or operating licenses would be issued until a revised environmental survey and an interim fuel cycle rule

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10. Memorandum from J. G. Temple, Jr., to Paul F. Oreffice and J. M. Leathers (Sep. 8, 1976), pp. 1-3. The Memorandum is Licensing Board Exhibit 1 in the hearings. Transcript of Proceedings, Dec. 1, 1976, p. 288. Testimony of Mr. Temple at the November 30-December 3 hearings shows that Consumers' reaction to Dow's concern has consisted chiefly of a threat to sue Dow for breach of contract. Transcript of Proceedings, Dec. 1, 1976, pp. 358-59.

had been prepared -- a process which might well require less than 120 days (Id. at 34708); and

(c) That questions concerning whether existing construction or operating licenses should be modified or suspended as a result of the NRDC decision would be handled on a case-by-case basis (Id. at 34709).

Just two months later, the Commission published a proposed interim fuel cycle rule, dated October 13, 1976 (41 F.R. 45849 [Oct. 18, 1976]). On November 5, 1976, the Commission also published a Supplemental Statement of Policy (41 F.R. 49898 [Nov. 11, 1976]), abrogating even the limited licensing moratorium it had announced in August, and also halting all pending suspension-of-license proceedings based on fuel cycle issues until after adoption of an interim rule.

The Commission explained that it feels its actions justified by the Court of Appeals' October 8, 1976 stay of mandate in NRDC v. NRC, on condition that any licenses issued after July 12, 1976 would be made subject to the outcome of further proceedings on review of that decision. The Commission also suggested that, while it would be "inappropriate" to

continue licensing on the basis of the fuel cycle rule set aside in NRDC v. NRC, the likelihood that a revised rule will deviate significantly from the earlier rule is so small that "conditional" licensing should be resumed. Thus, the Commission said, currently pending license proceedings will be suspended only if the result of applying the October 13, 1976 proposed interim rule (which may be finally adopted in January, 1977) "would tilt the cost-benefit balance against the issuance of the license." The Commission estimates that a final revised fuel cycle rule, replacing the interim rule, may be in place by July or August, 1977. 41 F.R. at 34707 (Aug. 16, 1976).

4. Current Procedural Developments In This Case. In view of Consumers' claims (Pet. at 2, 23) that the Court of Appeals' decision here will seriously impair "the Nation's nuclear energy program" and that it has "brought the entire nuclear power plant licensing program to a crashing halt," we note some things which have not happened since that deci-

sion was rendered.

First, although they obtained an extension of time for that purpose, neither Consumers nor the Commission (or anyone else) has sought rehearing of the Court of Appeals' decision.[11]

Second, neither Consumers nor any other party has sought reconsideration of the Court of Appeals' September 2, 1976 refusal to stay its mandate in this case, nor has any party sought a stay from this Court pursuant to 28 U.S.C. §2101(f) and Rule 27.

Third, neither the Commission nor the United

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11. To be sure, the Peitition (at pp. 1 n.,15) makes much of the fact that in NRDC v. NRC, the court below modified some of its references to the testimony of Dr. Pittman. That is not only irrelevant here (since Dr. Pittman was never a witness in this case), but also taken seriously out of context. It is true that the Commission did ask Dr. Pittman a grand total of six questions and answers, occupying just seven transcript pages. See the Commission's August 20, 1976 Motion in NRDC v. NRC, at p. 3 and attachment. That is de minimis at best, and certainly no ground for questioning the court's well-documented point that Dr. Pittman's testimony was uncritically accepted by the Commission. See P. App. at pp. 49-50, 62-63.

States has seen fit to seek certiorari, or even to join in Consumers' Petition; and, as noted previously, Dow Chemical Company has expressed no interest whatever in any such action. Indeed, the Commission has twice instructed the reconvened Licensing Board in this case to:

"...consider the following issues: energy conservation as a partial or complete substitute for construction; any changed circumstances concerning the need of the Dow Chemical Company for process steam and the impact of the continued operation of Dow's fossil fuel generating facilities; clarification of [the] report by the [ARCS]; and the environmental effect of nuclear waste disposal and fuel reprocessing."

In so ruling, the Commission rejected Consumers' contention that proceeding on those issues would be inappropriate in light of the pending petition for certiorari. Consumers Power Co., Dkts. Nos. 50-329, 50-330, Memorandum and Order, Nov. 5, 1976, pp. 1-2, 8 n. 1.

Finally, notwithstanding the Court of Appeals' decision -- now almost half a year old -- construction of the Midland nuclear plant has not been halted, or even slowed. Rather, construction proceeds apace, despite the Court of Appeals' clear warning (P. App.

at 21-22 n. 20), based on sound precedent (see e.g., Coalition for Safe Nuclear Power v. A.E.C., 150 U.S. App. D.C. 118, 463 F2d 954, 956 n. 1 [1972]), that Consumers will not be permitted to use the fact that it has spent large sums of money as a "bootstrap" justification for spending even more.

ARGUMENT

Because Consumers so assiduously confuses the issue, we stress at the outset that this case does not involve any judicial "usurpation" of the Commission's functions; that this case is not the NRDC v. NRC case, nor does it involve the same issues; and that this case does not pose any threat even to the Commission's current nuclear licensing program, let alone to the development of nuclear power in the United States. Rather, this case is no more than a run-of-the-mill exercise in applying plain statutory law to agency obligations. That, we submit, is manifest from the facts set out above (most of which Consumers blandly ignores). It is also manifest from the carefully circumscribed opinion of the Court of Appeals (which went out of its way to avoid the very "usurpation" Consumers so loudly protests), and from the far-from-novel nature of the legal principles on which the Court of Appeals based its ruling here.

Consumers' desperate attempt to lump this case together with NRDC v. NRC warrants a further

preliminary comment. Rather lopsidedly, Consumers devotes as much of its Petition to the NRDC v. NRC fuel cycle ruling -- which, as it pertains to this case, occupies just one paragraph of the Court of Appeals' 23-page opinion -- as it does to all of the other issues combined. Compare Petition, pp. 7-8, 12-16, 23-24, with Id., pp. 6-7, 17-23. But even if this Court were to hold that NRDC v. NRC had been wrongly decided, the Court of Appeals' judgment remanding this case to the Commission would be essentially unaffected. That judgment finds its roots not in the administrative law principles involved in NRDC v. NRC, but rather in the unambiguous substantive commands of the Atomic Energy Act (as regards the ACRS Report) and the National Environmental Policy Act (as regards the "energy conservation" issue and the need to restrike the cost-benefit analysis in light of the developing facts concerning the Consumers-Dow relationship). Far from "usurping" the Commission's role, the Court of Appeals merely declined to allow the Commission to play fast and loose with specific

statutory commands.

With respect to each of the Court of Appeals' rulings, we show below that the ruling was correct; that it does not present a conflict among the Circuits or with the decisions of this Court, and does not raise an important question of Federal law requiring decision by this Court within the meaning of Rule 19; and that it is highly inappropriate for review at this time, given the Commission's ongoing --- and far from completed -- proceedings in this case and the lack of a full record concerning the remanded issues.

I

THE COURT OF APPEALS' RULING CONCERNING THE ACRS REPORT WAS CLEARLY CORRECT, AND CONFLICTS WITH NO OTHER DECISIONS. IN ANY EVENT, THE ACRS HAS ALREADY SUBMITTED A REVISED REPORT, THE ADEQUACY OF WHICH HAS NOT YET BEEN DETERMINED

As the Court of Appeals correctly pointed out (P. App. at 18), "The role Congress intended for ACRS clearly emerges from its legislative history." Largely in response to the Commission's issuance of a construction permit despite an adverse ACRS Report

which had been administratively suppressed, in 1957 Congress gave ACRS an independent statutory existence, as a watchdog committee whose reports were required to be made public in order to promote "full, free and frank discussion in public of the hazards involved in any particular reactor" as "the most certain way of assuring that the reactors will indeed be safe." 1975 U.S. CODE CONG. & ADMIN. NEWS, Vol. 2, 85th Cong., 1st Sess., 1803, 1813-14; see also Union of Concerned Scientists v. AEC, 499 F2d 1069, 1073 n. 5, 1075 n. 13 (D.C. Cir. 1974). The Commission itself has long recognized both the mandatory nature and the importance of the legislative provisions for ACRS review of license applications. Hearing on a license application does not begin, and no decision thereon may be made, until the ACRS has completed its review; following that review, the ACRS Report "shall be made a part of the record of the [license] application." 10 C.F.R., Part 2, §§2.101(b), 2.101(c); Id., App. A, paragraphs I(a), I(b), V(f); Safety of Nuclear Power Reactors, AEC Doc. No. WASH-1250 (1973), p. 3-15.

The Commission's regulations further direct the Licensing Board to "review and become familiar with" the ACRS Report before the license hearing begins; the Commission Staff is affirmatively required to offer the Report "in evidence" at the hearing (10 C.F.R., Part 2, §2.743(g); and the Licensing Board itself is authorized to rely upon the ACRS conclusions, unless those conclusions are formally disputed by a party. Id., App. A, paragraph V(f)(1).

In light of that background, it is obvious that the obscure and unexplained reference to undefined "other problems" in the June 18, 1970 ACRS Report in this case failed to satisfy either the statutory purpose of public information and discussion or the Commission's own rules. After all, those rules permit a party to controvert ACRS conclusions. One can hardly controvert what one cannot understand, however; and Consumers' suggestion (Pet. at 22-23) that the public should be compelled to rummage through several thousand documents available in the Commission's public document room in order to find out

what "other problems" the ACRS has identified in unnamed other cases -- and then to indulge in outright guesswork about which of them the ACRS considered applicable to the Midland Plant -- is absurd on its face.

It follows, then, that the Court of Appeals was quite correct in holding that "[the] ACRS Report [in this case] on its face omits material information." P. App. at 20-21. Indeed, Consumers does not deny that fact. (It will be recalled that the December 18, 1972 supplemental ACRS letter on which Consumers relies, Pet. at 21-22, was not submitted until after the Licensing Board had concluded its hearings and rendered its decision in this case, and thus after any opportunity to contravene the ACRS conclusions had been foreclosed).

Thus the question becomes simply one of remedy. Since the Commission Regulations noted above require the ACRS Report to be placed "in evidence" at the license hearings and to be made a part of the record, and permit the Licensing Board to affirmatively rely on ACRS conclusions unless they are formally disputed,

it would seem that discovery from the ACRS concerning the meaning of its reference to "other problems" would be thoroughly appropriate. After all, the ACRS review process is explicitly "part of the administrative procedures" under the Atomic Energy Act, 1957 U.S. CODE CONG. & ADMIN. NEWS, Vol. 2, 85th Cong. 1st Sess., at 1825 (referring to 42 U.S.C. §§2231-2241); those administrative procedures are explicitly subject to the Administrative Procedure Act, 5 U.S.C. §551 et seq.; and both that Act and the Commission's own regulations (10 C.F.R., Part 2 §2.743(a)) allow the parties to such an administrative proceeding to seek and introduce relevant evidence and to cross-examine the submissions of other parties.

But the Court of Appeals did not even go that far in this case. Rather, it adopted what one can only term the minimum possible remedy, by holding that the ACRS Report should be sent back to the ACRS for clarification and supplementation. See P. App. at 18-21. Even concerning the supplementation which the court required, moreover, it carefully pointed out that the ACRS need not provide "detailed

factual findings of the kind necessary to aid judicial review." Id., p. 20 n. 14. And, expressly on the basis of this Court's decision in United States v. Morgan, 313 U.S. 409, 422 (1941), the court carefully safeguarded the collegial nature of the ACRS and prohibited inquiry into the "mental processes" of its members, P. App. at 20.

We submit that the Court of Appeals could have done no less, and that it would have been justified in doing much more.[12] That some remedy is needed in a case such as this is indisputable. Suppose, for example, that an ACRS Report consisted simply of a bald, unsupported statement that a given nuclear project presented no safety problems. Such a "report" would hardly comply with the Atomic

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12. It is at best doubtful that the Morgan rule properly applies here. As this Court noted in Power Reactor Development Co. v. Int'l Union of Elec. Workers, 367 U.S. 396, 402 (1961), ACRS members have testified as experts in some license proceedings. The Commission itself told Congress in 1961 that ACRS members "might be called as witnesses if the occasion should arise." Joint Committee on Atomic Energy, 87th Cong., 1st Sess., IMPROVING THE AEC REGULATORY PROCESS, Vol. II, App. 5 at 141 (Comm. Print 1961).

Energy Act, or even with the Commission's own regulations. Equally clearly, the licensing proceedings involving that plant could not proceed in the absence of a valid ACRS Report. Common sense indicates that the least disruptive -- and manifestly proper -- course, in such a situation, would be to return the Report to the ACRS for clarification and supplementation. That is exactly what the Court of Appeals did here.

Thus, the decision of the court below, insofar as it concerns the ACRS Report, was plainly correct. Consumers offers no showing whatever that the decision is in conflict with any other decision, either of this Court or of lower courts; we have found no such conflicting decision. Indeed, Consumers does not even seriously argue that the Court of Appeals' decision was wrong; virtually its entire argument on the point is directed at the question whether dis covery of ACRS members should be permitted. As we have seen, that is precisely what the Court of Appeals did not authorize. Finally, we note again that the Commission has already complied with the Court of Appeals' ruling concerning the ACRS Report, by

resubmitting that Report to the ACRS and requesting clarification and supplementation. The ACRS has now responded. The adequacy of its revised Report, when tested against the statutory command, has not yet been determined, either administratively or judicially. Under those circumstances, we submit that it is most inappropriate for this Court to address either the academic question or whether the first ACRS Report was genuinely defective of the presently premature question of whether the revised ACRS Report cures the defects found by the Court of Appeals.

II

THE COURT OF APPEALS' REMAND OF THIS CASE TO THE COMMISSION FOR CONSIDERATION OF ENERGY CONSERVATION ALTERNATIVES, AND FOR RECALCULATION OF THE COST-BENEFIT ANALYSIS IN LIGHT OF THE DEVELOPING FACTS CONCERNING DOW CHEMICAL COMPANY, WAS BOTH CORRECT AND IN ACCORDANCE WITH SETTLED LAW UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.

Consumers does not seriously contend that the Commission should not consider energy conservation issues in the course of its review of the environmental implications of the Midland nuclear plant. Any such argument would founder on the fact that

consideration of energy conservation alternatives to a project -- even if they merely suggest reducing the size of the project rather than abandoning it completely -- is a settled and mandatory obligation under NEPA. The Guidelines of the Council on Environmental Quality so state. 40 C.F.R., Part 1500, §1500.8(a)(4). The Nuclear Regulatory Commission itself has so held, Niagara Mohawk Power Corp., 6 A.E.C. 995 (1973) (P. App. at 252-53), and, even when its exclusionary approach was in vogue, had so suggested to Congress. Hearings On The Calvert Cliffs' Court Decision, Senate Committee on Interior and Insular Affairs (92nd Cong. 1st Sess., 1971), Part 2 at 406; Joint Hearings On Operation of [NEPA], Senate Committees on Public Works and Interior and Insular Affairs (92nd Cong., 2d Sess., (1972), at 27. The Court of Appeals had announced a similar rule even before the Licensing Board and the Appeal Board acted in this case. Natural Resources Defence Council v. Morton, 458 F2d 827, 836 (1972); see also P. App. at 10 n. 10. Indeed, while

this case was still before the Commission, the Federal Power Commission concluded that "energy alternatives," including "the potential for accomplishing the proposed objectives through energy conservation," were required as elements of its NEPA analyses. 18 C.F.R., Part 2, App. A, §8.2 (38 F.R. 15944, 15949, June 18, 1972).

Consumers seeks to evade that remarkably well-settled law by offering the curious proposition (Pet., pp. 17-19) that the Commission did in fact consider energy conservation alternatives, and by arguing that the Commission's "threshold test" (see Pet. at 18-20) is proper.

The first of those claims is simply contrary to fact. The record plainly shows that the Licensing Board -- the first, and in terms of factfinding the most important, step in the licensing process -- refused to consider energy conservation issues on the ground that those issues were "beyond our province." P. App. at 137-38, 146. The Appeal Board affirmed that ruling, adding that respondents' energy conservation contentions were "beyond the

pale of...NEPA" (P. App. at 236). For that reason, no evidence was introduced on respondents' energy conservation contentions. By itself, that disposes of any claim that those contentions were in fact considered on their merits. As we have previously pointed out, moreover, the Environmental Impact Statement is totally silent concerning such questions, and Consumers' only basis for claiming that those matters were considered derives solely from the Appeal Board's conclusory statement that those issues were "implicitly" a part of the Licensing Board's cost-benefit analysis (P. App. at 35-36) -- a claim totally undercut by the fact that the Appeal Board cited in support of its conclusion the very portions of the Licensing Board decision which refused to consider energy conservation issues. See P. App. at 137-38, 146, 253-36. Indeed, the Commission's reversal of position in Niagara Mohawk Power Corp., supra, is further proof that energy conservation issues were not considered in this case: that decision was not handed down until substantially

after the record before the Licensing Board was closed and the Licensing Board had rendered its initial decision.[13]

Consumers' attempt to justify the Commission's "threshold test," requiring intervenors themselves to bear the full burden of going forward on energy conservation issues, is equally wide of the mark. Ever since Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F2d 1109, 1118-19 D.C.Cir. 1971), it has been recognized that the Commission cannot "simply...sit back, like an umpire," treating

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13. In its January 24, 1974 refusal to reopen the record here (P. App., pp. 257-278), the Commission refused to apply Niagara Mohawk Power Corp., supra, retroactively. Id., p. 270. As the Court of Appeals pointed out, however, whatever leeway there may be for "prospective only" application of a newly developed administrative rule, that leeway does not extend to "disavowal of clear obligations a statute such as NEPA imposes on the agency itself." P. App. at 10, n. 9. That is particularly true, we submit, of cases such as this, which must be considered against the backdrop of the Commission's long-standing unwillingness to consider environmental issues unless it is forced to do so. See, e.g., Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F2d 1109, 1129 (D.C. Cir. 1971), where the Commission attempted just such a "prospective only" evasive tactic, again in a NEPA context.

environmental issues as though they were part of an adversary process. Rather, as the court held in Calvert Cliffs', the Commission -- like any other agency -- is required under NEPA to "take the initiative" in considering environmental values and alternatives "at every...stage of the process," and in developing the factual record on which that consideration is based. That has long been settled law. Greene County Planning Board v. FPC, 455 F2d 412, 420 (2d Cir. 1972); Environmental Defense Fund v. Corps of Engineers, 470 F2d 289, 298 (8th Cir. 1972), cert. denied, 409 U.S. 1072 (1972). The Commission's refusal to follow that rule in this case is no more than another example of the kind of "agency foot-dragging" criticized in Calvert Cliffs', supra, 449 F2d at 1129.[14] It bears repetition that even

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14. Consumers' citation (Pet., p. 19) of North Carolina v. FPC, 533 F2d 702, 707 (D.C. Cir. 1976), is highly misleading. In that case, the Court of Appeals pointed out that energy conservation alternatives had in fact been considered, and were specifically raised by the State in its petition for rehearing, as required under 16 U.S.C. §825(1)(b). Compare Indiana & Michigan Electric Co. v. FPC, 502 F2d 336, 339 (D.C. Cir. 1974), cert. denied, 420 U.S. 946 (1975), and see the discussion in the opinion

the Commission's ultimate (and grudging) reversal of its refusal to consider energy conservation issues apparently resulted primarily from the threat of judicial compulsion. See Ecology Action v. AEC 492 F2d 998, 1002 n. 4 (2d Cir. 1972).

Thus, the Court of Appeals' ruling on the energy conservation issues in this case was eminently proper. Consumers cannot seriously contend otherwise on the law, and its factual contentions are thoroughly inaccurate. An additional, and equally important, basis for the court's ruling lies in the settled premise that an agency's NEPA obligations do not stop short at the preparation of an environmental impact statement. To the contrary, at every stage of the agency process -- especially when, as here, it is protracted -- NEPA requires continuing re-evaluation of environmental costs and benefits in the light of additional information and changed

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of the court below, P. App. at 12-13. Petitioner confuses judicial review of the resolution of energy conservation issues (which was the problem in the cited cases) with judicial review of agency refusal to consider such issues at all (which is the problem here).

circumstances. 40 C.R.F., Part 1500, §1500.13; Sierra Club v. Froehlke, 359 F.Supp. 1289, 1339-41 (S.D.Tex. 1973); Environmental Defense Fund v. TVA, 468 F2d 1164, 1176 (6th Cir. 1972). The Commission itself pays lip service to that principle, as in Commonwealth Edison Co., ALAB-153, RAI-73-10, 821, 823-24 (1973):

> "...[I]t is not proper to resolve a major environmental question on the basis of a set of facts existing in the past if there is good reason to believe that there may have been an appreciable, and material, change in the factual situation."

That principle applies not only to the energy conservation issues, concerning which Consumers has admitted the inaccuracy of its own forecasts of electric demand (see pp. 17-19, supra), but equally forcefully to the drastic -- and still developing -- changes in the Consumers-Dow relationship (see pp. 11-12, 19-21, supra). That the Commission's complete refusal to reopen the license proceedings for updated evidence on those matters was utterly wrong is, we submit, beyond question, just as it is beyond question that the Commission's initial refusal to consider energy

conservation issues was wrong. It comes as no surprise, then, that the Court of Appeals remanded this case to the Commission so that the "required 'hard look' at environmental issues, including alternatives," which even Consumers admits NEPA demands (Pet. at 20), could be taken. Obviously, that "hard look" cannot be had if it is blinkered by a flat refusal to consider the existing facts.

The "energy conservation" and "new facts" portions of the Court of Appeals' decision were manifestly correct, then, and are in no sense contrary to holdings of this Court or other Federal Courts. In addition, review of those rulings at this time is premature at best. As noted at p. 25, supra, the Commission is even now immersed in the hearings required by the Court of Appeals. It is far from clear when those hearings will end -- and, on the basis of the information developed so far, it seems more than likely that the hearings will produce a great deal of additional information directly contrary to the stale factual assumptions on which both the Commission's EIS and its approval of

Consumers' construction license were based. To interrupt that process in midstream would be as inappropriate as it is improper, from the standpoint of the settled law (including the Commission's own decisions) requiring constant reevaluation and updating of environmental information.

III

THE COURT OF APPEALS CORRECTLY REQUIRED THE COMMISSION, ON REMAND, TO CONSIDER THE "UNADDRESSED FUEL-CYCLE ISSUES" WHICH HAD BEEN RAISED IN THIS CASE

As we noted at pp. 13-15,, supra, little or no consideration was given by the Licensing Board -- or, for that matter, the Appeal Board -- to the serious problems posed by nuclear waste management and reprocessing needs, and the Commission's Environmental Impact Statement is discreetly silent on the entire subject. The theory behind that silence, it appears, is that fuel cycle issues are "remote and speculative." EIS (R.17.355) at pp. III-43, 43, VII-1, XII-11, 12.

That, however, ignores the common-sense fact that any environmental analysis under NEPA inevitably

requires some degree of prediction. The whole object of NEPA is to force thorough and careful consideration of environmental factors before a decision has been made or resources are irretrievably committed. As the Court of Appeals held in Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 f2d 1109, 1128 (D.C.Cir. 1971):

> "By refusing to consider the requirement of alternatives until... [later], the Commission may effectively foreclose the environmental protection desired by Congress. It may also foreclose rigorous consideration of environmental factors at the eventual operating license proceedings. If 'irreversible and irretrievable commitment(s) of resources' have already been made, the license hearing (or any public intervention) may become a hollow exercise."

See also Environmental Defense Fund v. Corps of Engineers, 470 F2d 289, 298 (8th Cir. 1972), cert. denied, 409 U.S. 1072 (1972). Particularly when that inevitable requirement of prediction is coupled with the settled principle that NEPA requires analysis, "to the fullest extent possible," of "all known possible" environmental effects of any project -- let alone those which, as here, the Commission knows will

ineluctably occur -- the Commission's willingness to ignore fuel cycle issues outright cannot be justified. 42 U.S.C. 4332(2)(A), 4332(2)(C)(i), 4332(2)(C)(ii); Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 749, 759 (E.D.Ark. 1971); Natural Resources Defense Council v. Grant, 355 F.Supp. 280, 287 (E.D.N.C. 1973). Although the Commission cannot "foresee the unforeseeable,"

> "...by the same token, neither can [the Commission] avoid drafting an impact statement simply because describing the environmental effects of, and alternatives to, particular agency action involves some degree of forecasting. One of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'"

Scientists' Institute for Public Information v. AEC, 481 F2d 1079, 1092 (D.C.Cir. 1972).

Thus, the court below broke no new ground when it held that the Commission could not evade discussion of the nuclear waste problem merely on the ground that the problem was difficult (NRDC v. NRC, P. App. at 34-35):

> "As more and more reactors, producing more and more waste, are brought into being, 'irretrievable commitments [are] being made and options precluded...,' and the agency must predict the environmental consequences of its decisions as it makes them. See Aberdeen & Rockfish R.R. v. SCRAP, 422, U.S. 289, 320 (1975).
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> ".... [T]he real question...is whether the environmental effect of the wastes produced by a nuclear reactor may be ignored in deciding whether to build it because they will later be considered when a plant is proposed to deal with them.... Once a series of reactors is operating, it is too late to consider whether the wastes they generate should have been produced...; all that remain are engineering details to make the best of the situation that has been created."

Necessarily, then, the "fuel cycle" problems must be considered in some forum. Two are available: individual licensing proceedings (like this case), and "generic" rule-making proceedings (as in NRDC v. NRC). As Consumers concedes (Pet. at 13), the Court of Appeals nowhere undertook to "second-guess" the

Commission's choice of rule-making as the more appropriate forum. But that does not end the inquiry. It merely raises the problem of insuring that full and fair consideration is given to the fuel cycle problems in the chosen forum: "What the agency may not do, consistent with NEPA, is to fail to give these issues adequate consideration in either forum." NRDC v. NRC, P. App. at 36-37 n. 17 (emphasis added).

Consumers does not seriously challenge any of those points. Yet those points lead us unavoidably to the conclusion that if the chosen forum (or the manner of consideration afforded in that forum) proves inadequate in regard to a particular issue, then some other forum or means of consideration must be developed. Otherwise, the issue would never receive the "hard look" which NEPA requires. In the context of this case, that means simply this: Having concluded (in NRDC v. NRC) that the rule-making forum had yielded inadequate consideration of fuel cycle issues, the Court of Appeals acted quite correctly in holding that those issues could be

raised in the only other available forum -- individual license proceedings -- pending correction of the rulemaking errors. P. App. at 36, 64-65.

We do not deal here with the correctness of the Court of Appeals' determination, in NRDC v. NRC, that the Commission's rulemaking concerning fuel-cycle issues was inadequate. Notwithstanding Consumers' obfuscatory tactics, that rulemaking has nothing to do with this case. In this case, we are concerned only with the Court of Appeals' answer to the obvious question of what to do about fuel cycle issues in pending proceedings, in light of its holding that the rulemaking procedure was inadequate. The court answered that question by holding that those issues could be raised in licensing proceedings until the Commission completes an adequate rule-making. P. App. 36: "...absent effective generic proceedings to consider these [fuel cycle] issues, they must be dealt with in individual licensing proceedings." That is hardly startling. The very basis for precluding consideration of fuel cycle issues in licensing proceedings is that the rule-

making with regard to those issues was in fact adequate. Remove the rule-making, and the preclusion cannot stand. To point that out does not "usurp" any prerogative of the Commission. In our case, however, the Court of Appeals did no more than that (P. App. at 21):

> "The final EIS prepared in regard to Midland plant units 1 & 2 says only that fuel wastes will be shipped to unidentified offsite disposal areas. On remand, the Commission shall undertake appropriate consideration of waste disposal and other unaddressed fuel cycle issues, and restrike the cost-benefit analysis, as necessary, in accordance with NRDC v. NRC...."

That holding, once given the fact of the NRDC v. NRC decision, was quite correct; indeed, it is difficult to see what else the court could have done. Consumers' disinclination to grapple with what the court really held in this case, and its insistence on rearguing the merits of NRDC v. NRC, simply underscores its inability to fault the court's ruling here.

For the rest, we need only to point out that -- just as is true of the other issues in this case --

review of the Court of Appeals' narrow "fuel cycle" holding at this time would be singularly inappropriate. To begin with, even in NRDC v. NRC the Court of Appeals did not tell the Commission how it must conduct further fuel-cycle proceedings on remand. To the contrary, after pointing out that the record before it disclosed more a stifling than a "ventilation" of fuel cycle issues, the Court of Appeals said (P. App. at 64):

> "Many procedural devices for creating a genuine dialogue on these issues were available to the Agency.... We do not presume to intrude on the Agency's province by dictating which, if any, of these devices it must adopt to flesh out the record. It may be that no combination of the procedures mentioned above will prove adequate and the Agency will be required to develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking. On the other hand, the procedures the Agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice." [Emphasis added.]

Indeed, the Court of Appeals -- approaching the task before it in a manner similar to that adopted by this Court in SEC v. Chenery Corp., 332 U.S. 194 (1947) -- pointed out that the Commission "may well reach the

same conclusion [concerning fuel cycle problems] on remand." But, as the court went on to note, that is not the point. Rather, the point is that "if [the Commission] does so on [a complete] record, the Congress, the courts, and the public will all know where we stand." P. App. at 66.

As we noted at pp. 21-23, supra, the Commission is now busily engaged in the very process of re-examination of the fuel cycle issue, both procedurally and on the merits, directed by the Court of Appeals. To truncate the Commission's present proceedings would be absurd. Yet Consumers would have this Court do precisely that -- and, worse yet, by using a vehicle (this case) which has nothing to do with the substantive issues involved in NRDC v. NRC. Consumers' invitation should be rejected. Just as its jeremiads concerning the "frustrat[ion] of the Nation's nuclear energy program" and bringing ongoing license proceedings "to a crashing halt" are false, so also its invitation to this Court is thoroughly improper.

CONCLUSION

Because the Court of Appeals' rulings in this case were correct, because petitioner's challenges to those rulings ignore or misapprehend both the facts and the law, and because in any event review of those rulings is highly inappropriate at this time, respondents respectfully submit that the Petition for Certiorari should be denied.

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